SUPREME COURT, U. S.

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In the Supreme Court of the United States

OCTOBER TERM, 1967.

No. 73.

IN THE MATTER OF JOHN RUFFALO, JR.,
Petitioner.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF OF OHIO STATE BAR ASSOCIATION and MAHONING COUNTY BAR ASSOCIATION, in Support of Judgment Below.

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BRIEF OF OHIO STATE BAR ASSOCIATION and MAHONING COUNTY BAR ASSOCIATION, in Support of Judgment Below.

This brief is filed by the Ohio State Bar Association and the Mahoning County Bar Association in support of the judgment of the United States Court of Appeals for the Sixth Circuit disbarring Petitioner from practice before that court "until the further order" of that court. 370 F.2d 447 (A. 1, 53a-85a).

APPLICABLE RULE.

Petitioner Ruffalo quotes (pp. 2-3 and 6) the Fifth and Fourteenth Amendments, 45 U.S.C. 60, and Canons 10 and 42, none of which, for reasons to be stated, is believed to be here applicable. The Ohio Supreme Court's, and this Court's, disciplinary Rules also quoted (pp. 3-6) are tangentially involved. The only Rule which is directly applicable, Rule 6(3) of the United States Court of Appeals for the Sixth Circuit, Petitioner Ruffalo does not quote. The Sixth Circuit's Rule says:

"When it is shown to the court that any member of its bar has been suspended or disbarred from practice in any other court of record, or has been guilty of conduct unbecoming a member of the bar of the court, the member will be forthwith suspended from practice before the court and notice of his suspension will be mailed to him, and unless he shows good cause to the contrary within 40 days thereafter, he will be further suspended or disbarred from practice before the court."

QUESTIONS PRESENTED.

This case presents the questions:

1. Whether a lawyer who hires a workman as an undercover agent to investigate and prepare lawsuits against his employer may be disbarred for such conduct.
2. Whether a lawyer charged with such conduct may excuse it on the ground he did not know it was wrong and was not warned by specific Canon.

Petitioner Ruffalo suggests that the Record presents the further questions (pp. 6-7):

(a) Whether Petitioner was "required to make book entries" and produce them, and

(b) Whether maintaining clients by cash payments is misconduct,

but, it is believed, for reasons that will be developed, these questions are not properly here.

STATEMENT OF THE CASE.

The Court of Appeals, whose judgment is under review, acted upon a show-cause order issued by it upon receipt of the certificate of the Ohio Supreme Court concerning proceedings involving Petitioner Ruffalo in that court. It should, therefore, be noticed that—

—Petitioner Was Suspended by State Court.

Petitioner Ruffalo, admitted to the Ohio Bar in 1946 (A. 90a), was suspended on May 20, 1964, from practice by the Supreme Court of Ohio, 176 Ohio St. 263 (A. 1a-15a) on two grounds:

1. *Charge 13:* Hiring one Michael Orlando, a Baltimore & Ohio Railroad Company employee, to prepare, as an undercover agent, without the knowledge of his railroad employer, lawsuits against his employer, the B & O.
2. *Charge 8:* Maintaining clients by cash payments to them, one for a period of four years (A. 115a-116a), and another over a period of three and one-half years. (A. 117a-118a.)

Of the 14 charges made against Petitioner Ruffalo in the state proceedings by the Ohio Supreme Court Board of Commissioners on Grievances and Discipline, the Board sustained seven; as to five of these seven charges, the Ohio Supreme Court was "not in agreement as to whether the facts are as the board of commissioners recommended," 176 Ohio St. at 269-270 (A. 9a); however, the court upheld the two charges, 13 and 8, above mentioned. Concerning these two charges, as Petitioner Ruffalo agrees, there is no dispute of fact. (Petitioner's brief, pp. 7, 8, 16.)

The judgment of the Supreme Court of Ohio, *Mahoning County Bar Association v. Ruffalo* (1964), 176 Ohio

St. 263, 199 N.E.2d 396 (A. 1a-15a), became final on December 7, 1964, upon denial of certiorari here. 379 U.S. 931. The correctness of that judgment is not challenged by Petitioner Ruffalo.

(i) Nature of State Proceedings.

Disciplinary proceedings in Ohio are under the exclusive jurisdiction of the Ohio Supreme Court.[1]

Pursuant to its Rule XVIII (which is the same as the court's prior Rule XXVII as amended) the Ohio Supreme Court, as of January 1, 1957, put discipline in the hands of a Board of Commissioners on Grievances and Discipline consisting of 17 lawyers appointed by the Supreme Court, one from each of 17 districts in the state, each to serve a term of three years. Under the Rule, charges are heard by a panel of three members of the Board (including, in Petitioner Ruffalo's case, a former judge of the Supreme Court of Ohio), are reviewed by the entire Board of 17, and are then heard by the Supreme Court of Ohio.

That is the procedure followed in the Ohio proceedings that led to Petitioner Ruffalo's suspension by the Supreme Court of Ohio. Hearings were held by the panel:

December 26, 1962 (A. 89a, R. 3);
December 27, 1962 (A. 98a, R. 256);
December 28, 1962 (A. 104a, R. 534);
July 19, 1963 (R. 806);
August 16, 1963 (A. 135a, R. 831);

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[1] The history of discipline of the Bar in Ohio may be found in *Lawyer Discipline: The Ohio Story* (1967), by Professor Oliver Shroeder, Jr., of the Western Reserve University Law School, and in *Conduct of Attorneys*, 16 Western Reserve Law Review 893, by Samuel T. Gaines. The Ohio Supreme Court has asserted its exclusive jurisdiction of the subject of discipline in a series of cases: *In Re Nevius* (1963), 174 Ohio St. 560, 191

(Continued on following page)

and a Record of 1,034 pages was taken (all of which is lodged with this Court). Petitioner Ruffalo participated in the proceedings and also was there represented by counsel. (A. 89a, 122a, 135a.)

The significance of the Ohio Supreme Court's judgment of suspension, rather than disbarment, explained in *Cleveland Bar Association v. Pleasant* (1958), 167 Ohio St. 325, 326-327, 148 N.E.2d 493, and *In Re Nevius* (1963), 174 Ohio St. 560, 562, 566-567, 191 N.E.2d 166, is that, a lawyer disbarred, is disbarred "for life with no possibility for reinstatement," 174 Ohio St. at 566, whereas a lawyer suspended, may apply for reinstatement after two years.

This distinction between suspension and disbarment, observed in the state practice, does not prevail in the Sixth Circuit; the judgment there entered, and here challenged, strikes Petitioner "from the roll of counsel," such discipline to "remain in force until the further order" of that court. (A. 1.)

(ii) Charge of Hiring B. & O. Employee as Undercover Agent.

The proceedings as printed in the Appendix (consisting of two volumes) are not in chronological order; instead all of the testimony of a given witness is there collected in one place and all colloquy in one place. This is a convenience, but it gives the impression that the

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(Continued from preceding page)

N.E.2d 166; *Mahoning County Bar Association v. Franko* (1958), 168 Ohio St. 17, 151 N.E.2d 17, certiorari denied (1958), 358 U. S. 932; *Cleveland Bar Association v. Pleasant* (1958), 167 Ohio St. 325, 148 N.E.2d 493, certiorari denied (1958), 358 U. S. 842; *In Re McBride* (1956), 164 Ohio St. 419, 132 N.E.2d 113, certiorari denied (1956), 351 U. S. 965; and *In Re Thatcher* (1909), 80 Ohio St. 492, 93 N.E. 895, appeal dismissed (1909), 216 U. S. 625.

charge of hiring B. & O. employee Michael Orlando as an undercover agent (which is the charge on which the Sixth Circuit disbarred), came late in the proceedings, after Petitioner had told the full story without knowing this was a charge of misconduct, and, without opportunity to respond.

Actually, the charge of hiring Orlando as an undercover agent was added on December 28, 1962, at the close of the morning session of the third day of hearings (A. 127a, 131a) and was based chiefly (A. 130a) on the testimony of Orlando. (A. 137a-150a.) Charge 13, made as an amendment, charged:

> "That Respondent did conspire with one, Michael Orlando, and paid Michael Orlando moneys for preparing lawsuits against the B. & O. Railroad, the employer of said Michael Orlando, during all the periods of time extending from 1953 to July of 1961, well knowing that said practice was deceptive in its nature and was morally and legally wrong as respects the employee, Michael Orlando, toward his employer, the B. & O. Railroad Company." (A. 127a.)

Although Orlando had worked as an investigator for Petitioner Ruffalo "since 1953" (A. 138a), and continued until July 18, 1961 (A. 138a), Charge 13 was amended at Petitioner Ruffalo's request at the afternoon session on December 28, 1962, to aver that the employment of Orlando covered: "the periods of time extending from '57 to 1961." (A. 131a.) Petitioner Ruffalo requested that this change be made because:

> "These matters dealing here with the particular Specifications in the complaint before this Court deal with matters from 1957 to '61. Any matters before that time are not now particularly within the province of this Panel. And I would like to amend it in that respect." (A. 131a.)

Petitioner Ruffalo's request to change the beginning date from 1953 to 1957 was allowed. (A. 131a.) As so amended, Charge 13 was sustained by the Supreme Court of Ohio and it is the charge on which the Sixth Circuit acted. 370 F.2d at 450 (A. 57a).

(iii) Opportunity to Answer Was Given.

The panel, in the state proceedings, made clear that Petitioner Ruffalo could have whatever time he might need to meet the charge thus added. (A. 127a, 128a, 132a.) The next hearing (R. 806) was not held until July 19, 1963 (nearly seven months after the charge was made) and this was followed by a further hearing a month later on August 16, 1963. (A. 135a.)

Petitioner Ruffalo does not claim that he was not given adequate time or opportunity to respond to the charge.

(iv) Nature of Orlando's Work for Petitioner Ruffalo.

Orlando testified that he worked for Ruffalo as "an investigator." (A. 138a.) He added:

> "we consult one another on lawsuits; I transport witnesses. I am with him—when he is filing these lawsuits, I mean as he is trying these lawsuits in Federal Court in Pittsburgh, Cleveland, Warren, whatever court, I am with him two or three days, four days, whatever time it takes." (A. 139a.)

Petitioner Ruffalo confirmed the fact that he hired Orlando "as an investigator." (A. 118a.) "He is a fact-finding person * * *." (A. 126a.) Ruffalo testified:

> "His job specifically has been to investigate cases which I turn over to him to investigate, particularly pertaining to railroad cases, to find witnesses, to obtain statements from witnesses, to help me in—and assist me in matters regarding railroad knowledge

and the operation of railroads, and on occasions to transport witnesses for me." (A. 118a-119a.)

(v) Petitioner Ruffalo Hid His Employment of Orlando as an Undercover Agent from Orlando's Employer B. & O.

Petitioner Ruffalo paid other investigators by check (A. 95a), but he paid Orlando in cash (A. 93a, 95a), and kept no record of these payments. (A. 93a, 95a, 99a.) This was "Because he was an employee of the B. & O. Railroad" (A. 94a), and "we didn't want it to be known, in case any question came out about it, that he was a B. & O. employee who was doing investigating work for me." (A. 95a, 101a, 120a.) Ruffalo said:

> "we kept it that way for the particular fact that he was working for the B. & O. Railroad, and we didn't want to get him involved with the B. & O. Railroad." (A. 93a.)

Ruffalo paid Orlando $25 per day plus expenses for his work. (A. 119a, 139a, 142a.) Orlando had steady work with the B. & O. five days a week (A. 142a, 146a); at the same time he worked for Ruffalo "an average" of "10 or 15 days a month." (A. 139a.) He continued to work for Ruffalo until July 18, 1961. (A. 138a.) On that date his dual employment for Ruffalo and the B. & O. terminated. At the hearing of December 26, 1962, Ruffalo testified:

> "Q. * * * Mike Orlando hasn't been an employee of the B. & O. Railroad for better than a year and a half, has he?
>
> A. That's right.
>
> Q. You have paid him money in that interim?
>
> A. I have not.
>
> Q. You have not? You haven't paid him a dime since he was discharged by the B. & O. in Akron?
>
> A. (Shaking head.)

Q. You mean that?
A. No, I haven't." (A. 95a-96a.)

The total amounts paid by Ruffalo to Orlando were disclosed by Ruffalo, as shown by his income tax information returns, Form 1099, filed with the United States Treasury. Ruffalo reported to the Treasury, for income tax purposes, that he paid Orlando the following amounts (A. 110a):

Year	Amounts Reported to Internal Revenue Service as Paid to Orlando
1957	$2,950.00
1958	1,250.00
1959	1,273.37
1960	3,829.25
1961 (To July 18)	4,716.00
Total	$14,018.62

(vi) Petitioner Ruffalo Was Not Disciplined For Hiring an Investigator But For Hiring an Employee to Work, as an Undercover Agent, on Cases Against His Employer.

The discipline recommended by the trial panel, and by the Board of Commissioners, was based not on the ground that Petitioner Ruffalo had hired an investigator, but on the ground that he had hired an employee to work, as an undercover agent, on cases against his own employer. The following will indicate the views of the Commissioners and of Petitioner Ruffalo on this subject:

"MR. BIERCE: Mr. Ruffalo, here is a man working for the B. & O. Railroad; he is doing investigating work for you. You failed to keep the records. Was it because you knew that he was working in effect against his own employer, his other employer, and you were covering it up by destroying the records? Now, is that a fact?

MR. RUFFALO: The fact was we knew that he as a railroad employee might be subject to some censure by his company if they knew that he was working for me as an investigator. They don't like it. But he has a perfect right to do that, as long as he does not go on their property or take photographs on their property or do anything like that. His time is his own.

MR. BIERCE: He was working on your cases that were against the B. & O. Railroad, wasn't he?

MR. RUFFALO: He did on some, yes.

CHAIRMAN BEIRNE: On the Naomi Clark case, he said he did.

MR. RUFFALO: Oh, yes.

MR. BIERCE: He was working against the B. & O., and isn't that the reason that both of you have no records of the work that he did for you as an investigator; because he was working on cases against his own employer?

MR. RUFFALO: That's right. That was to protect him.

MR. BIERCE: You knew that?

MR. RUFFALO: Oh, yes, I knew it and—

MR. BIERCE: And you took part in it?

MR. RUFFALO: There was nothing wrong with it. It was perfectly proper for him to be able to do those things.

CHAIRMAN BEIRNE: Mr. Ruffalo, do you think it is not improper for an employee to work on cases against his employer, especially without his employer's knowledge?

MR. RUFFALO: On his own time, in his time off, he has a right to do whatever he wishes.

CHAIRMAN BEIRNE: Even against his own employer? Do you think his allegiance to his employer ceases when he punches a timeclock?

MR. RUFFALO: Lots of people hold down two jobs. Lots of people take another job—

CHAIRMAN BEIRNE: I am not questioning that. I am questioning the right of an employee to work

with a lawyer in suits against his own employer while he is on the payroll of his employer. Do you think there is nothing wrong with that?

MR. RUFFALO: I don't see that there was anything wrong in what he was doing in investigating a case which he had not in any way brought into my office or had anything to do with.

MR. BIERCE: If you thought that, why didn't you keep all these records? Why did you destroy everything so there would be no records of anything, if you thought it was perfectly aboveboard and perfectly all right?

MR. RUFFALO: I tried to protect him from any eventuality of this kind, that's all.

JUDGE MIDDLETON: Because you knew it wasn't right; you knew that this was morally wrong?

MR. RUFFALO: No, I didn't interpret it as being morally wrong." (A. 123a-124a.)

The discussion went on:

"JUDGE MIDDLETON: And you think that is all right?

MR. RUFFALO: Well, I can see no wrong in a man doing it on his own time.

CHAIRMAN BEIRNE: Even against his own employer?

MR. RUFFALO: Well, he is not really against his own employer.

CHAIRMAN BEIRNE: Well, that is my question to you. Even if it is against his own employer; you make no distinction?

MR. RUFFALO: No, I don't see that it is wrong. It is his time. I think our concepts have changed from the time when a man went to work in the mill and he worked 14 hours a day and he was owned by the boss and—." (A. 126a-127a.)

The Ohio Supreme Court, as to this charge, concluded:

"In our opinion, one who believes that it is proper to employ and pay another to work against the interests of his regular employer is not qualified to be a member of the Ohio Bar. He is even less qualified if he does so, when he knows, as the evidence clearly indicates Ruffalo did know, that it is improper to do so." 176 Ohio St. at 269 (A. 8a).

—Proceedings in District Court.

Upon receipt of the Ohio Supreme Court's certificate the United States District Court for the Northern District of Ohio issued a show-cause order, and, upon hearing, concluded that Petitioner Ruffalo should not be disbarred. *In Re Ruffalo* (N.D. Ohio, 1965), 249 F.Supp. 432 (A. 16a-52a).

The District Court, Judge Battisti, considered (A. 29a) the two charges the Ohio Supreme Court had upheld, and disagreeing with that court, said:

1. It was not misconduct to hire the undercover agent. The District Judge pointed out that "it might have been the soundest and most appropriate course of action for the Respondent to have limited Orlando's investigative work to cases other than those involving the Baltimore & Ohio Railroad," 249 F. Supp. at 446 (A. 44a), and recognized that such employment "might well be fraught with difficulties, and * * * the regular employer might well be sensitive in this regard," 249 F. Supp. at 446 (A. 43a, 45a), but held this was not ground for disbarment because the evidence did not show "that Respondent caused Orlando to engage in unfair and unethical practices * * *." 249 F. Supp. at 450 (A. 51a).
2. It was not misconduct to make cash advances to clients. The District Judge concluded "it would

> be unreasonable to find that the making of these loans by the Respondent constituted a practice calculated to solicit employment by others or as a gimmick to unethically advertise his services." 249 F.Supp. at 443 (A. 37a).

Upon then learning that the Sixth Circuit had started its own proceedings, Judge Battisti, in the District Court, deferred the entry of an order "pending a decision by that Court." 249 F.Supp. at 450 (A. 52a). When the Sixth Circuit's decision issued, Judge Battisti entered, in the District Court, an order suspending Petitioner Ruffalo from practice until further order. (A. 86a-87a.)

No appeal was taken from the District Court's judgment.

—Proceedings in Court of Appeals.

The Court of Appeals, in its independent consideration of the return on the show-cause order it had entered, ruled only on the question whether it was misconduct to hire Orlando as an undercover agent to investigate, and obtain evidence, "to be used in Ruffalo's cases against Orlando's own employer, the B. & O." 370 F.2d at 451 (A. 59a). The majority, Judges O'Sullivan and Phillips, concluded:

> "an experienced lawyer who hires a railroad employee to act as an undercover agent to obtain evidence and information for use in suits against his own employer, does not exhibit the fair character and integrity which must be a mark of a lawyer." 370 F.2d at 453 (A. 63a-64a).

The Court did not pass on the question whether it also was misconduct to make cash advances to clients. "We do not reach that question." 370 F.2d at 450 (A. 58a).

The judgment the Sixth Circuit entered was that Petitioner be:

> "stricken from the roll of counsel permitted to practice before this court. This discipline shall remain in force until the further order of this court." (A. 1.)

Judge Edwards dissented.

As to the impropriety of hiring the opposing party's employee as an undercover agent, Judge Edwards agreed with the majority. Judge Edwards said "the employment of a railroad employee to investigate accident claims against his own employer opens a tempting door to industrial spying which no person of ordinary conscience should be asked to go by every normal work day." 370 F.2d at 462 (A. 84a). The dissent came instead on the ground that a lawyer charged with misconduct:

> "should have advance notice that the act he was charged with was an offense, and prior to his hearing he should have written notice of the charge made against him. Respondent here had neither." 370 F.2d at 462 (A. 84a).

Petitioner Ruffalo here argues only the first of these two points, that he did not have advance notice that what he did was wrong; he does not support the second point: He does not complain of want of "written notice of the charge" or assert that he was not given time and full opportunity to answer it.

SUMMARY OF ARGUMENT.

I. The disbarment should be upheld upon the rule that a lawyer disbarred by the highest court of his state, will ordinarily not be allowed in Federal Court. Although the state judgment is not binding on federal courts, it will, in absence of "grave reason," be there deemed decisive, for it would be "unseemly" that a lawyer adjudged unfit to appear in the courts of his own state be admitted to plead in the federal courts. The Court of Appeals found no impropriety in the state proceedings; in addition, exercising its own independent judgment on undisputed facts, it concluded that the order of disbarment should issue.

II. Petitioner Ruffalo's claim that he was not warned that what he did was wrong is without merit. He had before him seven centuries of discipline of the profession, beginning, in the words of Judge Cardozo, "in its home across the seas," and of enforcement by the courts of the high standard, purging from their rolls the lawyer whose conduct is "unbecoming his profession." This standard, reflected in the Rules of this Court, was made clear to Ruffalo in the oath of office he took, in the Canons, and in the decisions of courts. By his conduct in hiring an employee as an undercover agent to develop evidence in suits against his employer, Ruffalo demonstrated, as the Court of Appeals held, and as the Supreme Court of Ohio had held, his want of "the fair character and integrity which must be a mark of a lawyer."

III. Constitutional claims with respect to records asserted by Petitioner Ruffalo are inapplicable. He was not disbarred because of records; he was disbarred for want of "fair character," demonstrated by his employment of a workman as undercover agent to develop evidence against his employer. The testimony about records entered

into the proceedings before the Supreme Court of Ohio only in that what Petitioner Ruffalo said on the subject (1) confirmed his awareness of the impropriety of his conduct, and (2) bore on his frankness and honesty.

IV. Issue of maintaining clients is not properly here. Petitioner Ruffalo was not disbarred on this ground; the Court of Appeals did not pass on it. If it is desirable to pass on this question, or on the other charges (which the Court of Appeals reserved) the matter should be remanded to the Court of Appeals. It is unlikely the Court of Appeals would approve a lawyer maintaining clients while their cases wait trial, and it should not.

ARGUMENT.

The judgment of the Sixth Circuit should be affirmed:

I. THE DISBARMENT SHOULD BE UPHELD ON THE RULE THAT A LAWYER DISBARRED BY THE HIGHEST COURT OF HIS STATE WILL ORDINARILY NOT BE ALLOWED IN FEDERAL COURT.

The state court's suspension, of course, is not binding on the federal court:

> *Theard v. United States* (1957), 354 U.S. 278, 282; *Selling v. Radford* (1917), 243 U.S. 46, 51.

However, as *Theard*, 354 U.S. at 282, makes clear, the state judgment "brings title deeds of high respect," and will not be overborne except for "some 'grave reason'," for it would be "unseemly," as *Selling*, 243 U.S. at 48 and 50, points out, that a lawyer adjudged unfit to appear in his state court be allowed in federal court. *In re Disbarment of Crow* (1959), 359 U.S. 1007. In dealing with disbarment, *Ex parte Burr* (1824), 6 U.S. (9

Wheaton) 529, says a reviewing court will interfere (p. 530) "only in a plain case." Mr. Chief Justice Marshall observed (p. 530):

> "the court is not inclined to interpose, unless it were in a case where the conduct of the circuit or district court was irregular, or was flagrantly improper."

The court will look first, as did the court below, pursuant to the command of *Theard*, 354 U.S. at 282, to the points "authoritatively expounded in *Selling*" to determine whether recognition is to be accorded to the state judgment. For this, *Selling* poses three tests (243 U.S. at 51):

1. Whether "the state procedure from want of notice or opportunity to be heard was wanting in due process"—a point that here does not arise because adequate opportunity to meet the charge was given and Petitioner Ruffalo does not contend otherwise.
2. Whether there was "an infirmity of proof as to facts found"—a point that does not here arise because Petitioner Ruffalo (Brief, p. 7) "does not question the findings of fact as to his conduct * * *"
3. Whether "some other grave reason existed" to make it improper to accept the state's judgment.

If the state proceedings meet these tests, and no "grave reason" exists for refusing to give effect to the state judgment, that is, and surely ought to be, the end of the matter.

Here the tests laid down in *Selling*, and re-affirmed in *Theard*, are satisfied.

II. PETITIONER RUFFALO'S CLAIM THAT HE WAS NOT WARNED THAT WHAT HE DID WAS WRONG IS WITHOUT MERIT.

Petitioner Ruffalo does not complain that he was in any respect denied procedural due process. He could not very well so claim. *Randall v. Brigham* (1868), 74 U.S. (7 Wall.) 523, 540. He was given, and availed himself of, opportunity to meet every charge laid against him. He was given a full and fair hearing, first by his brothers at the Bar, then by the Supreme Court of Ohio, and, finally, by the Court of Appeals for the Sixth Circuit.

What Petitioner Ruffalo does say is that no Canon, no case, no statute, no rule, warned him that it is improper to hire a workman, without his employer's knowledge, to act as an undercover agent to develop evidence against his employer. Therefore, Petitioner Ruffalo says, to disbar him for such conduct is the equivalent of convicting him for violation of a vague and uncertain statute, and is, therefore, a denial of constitutional right. A similar argument in *Bell v. Board of Regents of University of State of New York* (1946), 295 N.Y. 101, 65 N.E.2d 184, made by a dentist who said he did not know, because he had not been warned by Regulations or otherwise, that it was "unprofessional conduct" to enter into partnership with a layman, was answered by the New York court with the comment:

> "We must assume * * * he had entered upon a profession." 65 N.E.2d at 189.

As much may be expected of a lawyer.

However, Petitioner *was* warned—as next will be pointed out:

1. Petitioner Was Warned by Law of Seven Centuries That What He Did Was Wrong.

The earliest known standard regulating the legal profession, Henry S. Drinker reports in *Legal Ethics,* Columbia University Press, 1953, page 14, is to be found in the year 1275, in the Statute of Westminster, First, 3 Edward I, Chapter 29. This statute, recorded in "The Statutes at Large, From Magna Charta to the End of the Eleventh Parliament of Great Britain, *Anno* 1761," by Danby Pickering, of Gray's-Inn, Esq.; Reader of the Law Lecture to that Honourable Society, published in London, 1762, by Joseph Bentham, Printer to Cambridge University, says:

> "if any serjeant, pleader, or other, do *any manner of deceit* or collusion in the King's court, or consent unto it, in deceit of the court, or *to beguile* the court, *or the party,* and thereof be attainted, he shall be imprisoned for a year and a day, and from thenceforth shall not be heard to plead in that court for any man; * * * and if the trespass require greater punishment, it shall be at the King's pleasure." [2]

Drinker points out that, in England, disbarment of Barristers was by the Benchers of the Inn, and was for (p. 33):

> "guilt of 'misconduct *unbecoming his profession.*' "

This standard applies also to Solicitors, and is enforced by the Disciplinary Committee of the Law Society. 36 *Halsbury's Laws of England,* 3rd ed., Solicitors, §§ 306, 308, pp. 221-222. Apart from the statutory grounds, Solicitors are subject to disbarment for:

> "conduct *unbefitting a solicitor.*"

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[2] Emphasis supplied throughout.

This is the same standard this Court to this day enforces. This Court's Rule 8 lays down the standard for which this Court will disbar as:

> "conduct unbecoming a member of the bar of this court * * *."

The standard applied, and upheld, by the Court of Appeals for the Sixth Circuit is the same. Its Rule 6(3) provides disbarment for:

> "conduct unbecoming a member of the bar of the court * * *."

Petitioner Ruffalo, however, says that the standard in Ohio is different, and that the Ohio Supreme Court's Rule XVIII(5)(a) defines misconduct as "any violation of the Canons" and that, therefore, unless a Canon forbidding the hiring of an employee as an undercover agent to develop cases against his employer can be found, he cannot be disciplined.

Petitioner is mistaken.

To begin with, the Ohio judgment is no longer open to review. It became final when this Court refused to review it. 379 U.S. 931. The disbarment here in question is the disbarment by the Court of Appeals for the Sixth Circuit.

Moreover, Petitioner Ruffalo's view of the Ohio standard is a mistaken one. The Ohio Supreme Court's Rule XVIII (5) (a) says:

> "Misconduct shall mean any violation of any provision *of the oath of office* taken upon admission to practice of law in this State, *or any violation of the Canons* of Professional Ethics or the Canons of Judicial Ethics as adopted by the Court from time to time, disobedience of the terms of an order imposing a suspension for an indefinite period from the practice

of law, or the commission or conviction of a crime involving moral turpitude."

Observe *first* that it is misconduct to violate the oath the lawyer takes upon his admission to the bar. That oath, prescribed by Ohio Supreme Court Rule XVII, Section 7(A), includes this:

> "I will employ for the purpose of maintaining the causes confided to me *such means only* as are consistent with truth and honor * * *."

Next, observe that the Canons do not purport to cover every offense in detail. The Canons warn, in the Preamble, that:

> "No code or set of rules can be framed, which will particularize all the duties of the lawyer"

and that:

> "the enumeration of particular duties should not be construed as a denial of the existence of others equally imperative, though not specifically mentioned."

Additionally, Canon 15 points out that:

> "Nothing operates more certainly to create or to foster popular prejudice against lawyers as a class and to deprive the profession of that full measure of public esteem and confidence which belongs to the proper discharge of its duties than does the false claim, often set up by the unscrupulous in defense of questionable transactions, that it is the duty of the lawyer to do *whatever may enable him to succeed* in winning his client's cause"

and that:

> "The office of attorney does not permit, much less does it demand of him for any client, violation of law or *any manner* of fraud or chicane."

Canon 29 adds that the lawyer:

"should strive at all times to *uphold the honor* and to maintain the dignity of the profession * * *."

Canon 41 says:

> "When a lawyer discovers that some fraud *or deception* has been practiced, which *has unjustly imposed upon* the court or *a party*, he should endeavor to rectify it; at first by advising his client, and if his client refuses to forego the advantage thus unjustly gained, he should promptly inform the injured person or his counsel, so that they may take appropriate steps."

The business in which Petitioner Ruffalo engaged in hiring as an undercover agent an employee of the party he was suing, to develop evidence against that party, will not square with these standards, and the fact that no Canon says, in so many words, that it is misconduct to so hire an employee of the opposing party, cannot excuse what Petitioner Ruffalo did.

The Court of Appeals was surely right when, in judgment on Ruffalo's excuse that "no Canon of Ethics had ever been promulgated forbidding the practice," it said:

> "We will not hold that due process requires that our bar associations anticipate every conceivable type of misconduct in which any of its members may indulge, and then fashion and announce a Canon of Ethics to fit each act of misconduct." 370 F.2d at 454 (A. 65a).

This Court expressed the same view in *Ex parte Secombe* (1856), 60 U.S. (19 How.) 9. The expression there, to be sure, was *dictum*, for the Court held that removal of counsel from the rolls of the Supreme Court of Minnesota could not be reviewed here upon a writ of mandamus. However, it may be noted that the lawyer there asserted, much as here, that the Minnesota statutes (p. 14)

"enumerated the offenses for which he may be removed," and, since "he is not found guilty *of any specific offense*," his disbarment is a denial (p. 10) "of due process of law." He had been held by the Minnesota court to be (p. 11) "guilty of a wilful violation" of Chapter 93, Section 7, Subdivision 2, of the Minnesota statutes. That statute made it the duty of every lawyer (p. 14):

> "to maintain the respect due to the courts of justice and judicial officers"

but did not specify (p. 14) "the acts which shall be deemed disrespectful to the court or the judicial officers." As Mr. Chief Justice Taney observed (p. 14):

> "the statute has done but little, if anything, more than enact the general rules upon which the courts of common law have always acted * * *."

The Court saw no impropriety in this. Indeed, said the Chief Justice (p. 14):

> "it is difficult, if not impossible, to enumerate and define, with legal precision, every offence for which an attorney or counsellor ought to be removed."

These standards, which Petitioner Ruffalo says are vague and uncertain, and gave him no warning, are the standards the courts enforce. Observe that—

—(a) Petitioner Was Warned by Decisions That Courts Enforce Such Standards.

If further warning were needed, it was to be found in, for example, the following important landmarks:

> *In re McBride* (1956), 164 Ohio St. 419, 132 N.E.2d 113, certiorari denied (1956), 351 U. S. 965;
>
> *Mahoning County Bar Association v. Franko* (1958), 168 Ohio St. 17, 151 N.E.2d 17, certiorari denied (1958), 358 U. S. 932;

In re Rouss (1917), 221 N.Y. 81, 116 N.E. 782, certiorari denied (1917), 246 U. S. 661;
People, ex rel. Karlin v. Culkin (1928), 248 N.Y. 465, 162 N.E. 487.

In re McBride (1956), 164 Ohio St. 419, 132 N.E.2d 113, although dealing principally with the problem of solicitation, was not limited to that question. The decision made clear that (p. 424) "the statutory grounds for the suspension or disbarment of an attorney are *not* exclusive," and laid down the rule that (Syllabus 5):

> "The conduct of an attorney in the pursuit of his profession which may subject him to disbarment, suspension or other disciplinary measures is that which brings discredit upon himself, his profession and the courts and which violates his oath of office and the recognized and accepted code or rules governing his profession."

Judge Zimmerman went on to say:

> "The legal profession is a high and dignified calling, and those who enter it should recognize that fact and govern themselves accordingly. Upon being admitted to the practice of law they take a solemn oath which binds them to superior standards of conduct. Integrity, honesty and dignity are three attributes which clients, courts and the public have a right to expect and demand from those who follow the profession of law." (164 Ohio St. at 425-426.)

The court again, in *Mahoning County Bar Association v. Franko* (1958), 168 Ohio St. 17, 151 N.E.2d 17, in holding that a judge who becomes a candidate for non-judicial office must resign his judicial post, emphasized in the opinion by Judge Matthias, that:

> "persons admitted to the practice of law in this state must maintain a high degree of integrity and an ex-

ceptionally high standard of conduct." (168 Ohio St. at 22-23.)

This is in accordance with standards prevailing generally everywhere. *In re Rouss* (1917), 221 N.Y. 81, 116 N.E. 782, for example, ordered disbarred a lawyer for spiriting a witness out of the jurisdiction although no Canon expressly says that a lawyer will be disbarred if he enters into an arrangement for a money consideration with a witness (116 N.E. at 783) to "keep without the state." Judge Cardozo observed:

> "Membership in the bar is a privilege burdened with conditions. A fair private and professional character is one of them. Compliance with that condition is essential at the moment of admission; but it is equally essential afterwards. * * * Whenever the condition is broken the privilege is lost." 116 N.E. at 783.

—(b) Decisions Show That Standards Need Not Cover Every Violation in Detail.

The argument Petitioner Ruffalo makes, that he should have been told in advance by a specific Canon covering the point in detail—and, failing that, the courts must forego disbarment—has been made before. And it has been rejected:

> *Reyburn v. Minnesota State Board of Optometry* (1956), 247 Minn. 520, 78 N.W.2d 351;
> *Bell v. Board of Regents of University of State of New York* (1946), 295 N.Y. 101, 65 N.E.2d 184.

Reyburn, 247 Minn. 520, 78 N.W.2d 351, although it dealt with a different professional group, optometrists, illustrates the point. The State Board issued an order upon Reyburn and others to show cause why their licenses should not be revoked or suspended for "unprofessional

conduct." They challenged the proceedings on the ground (78 N.W.2d at 355) that the statute in authorizing revocation or suspension for "unprofessional conduct," fails "to provide sufficient administrative standards * * *." The court rejected this argument. The court said:

> " 'Unprofessional conduct' is conduct which violates those standards of professional behavior which through professional experience have become established, by the consensus of the expert opinion of the members, as reasonably necessary for the protection of the public interest." 78 N.W.2d at 355.

The court, rejecting the kind of argument Petitioner Ruffalo here makes, ruled that:

> "The legislature need not enumerate what specific acts or omissions constitute unprofessional conduct since the phrase 'unprofessional conduct' itself provides a guide * * *." 78 N.W.2d at 355.

Bell, 295 N.Y. 101, 65 N.E.2d 184, makes the same point. There the license of a dentist was suspended "for unprofessional conduct." 65 N.E.2d at 185. The accused complained that the Board had never adopted any regulation defining "unprofessional conduct," and argued, as does Petitioner Ruffalo, that:

> "unless the Board of Regents prescribes by regulation the acts which shall constitute unprofessional conduct, no dentist may be disciplined * * *." 65 N.E.2d at 186.

The court thus had before it "a straight charge of unprofessional conduct, without any 'regulation' or 'rule' adopted by the Board * * *." 65 N.E.2d at 186. The court said:

> "It has never been necessary for the Legislature or the Board of Regents to define with particularity acts

which would constitute unprofessional conduct * * *." 65 N.E.2d at 187.

Numerous decisions demonstrate that disbarment and other penalties are enforced by the courts even though no Canon expressly, or in detail, has branded as misconduct the acts complained of, or warned the lawyer of coming discipline for such conduct. The following will illustrate the point:

Kingsland v. Dorsey (1949), 338 U.S. 318, held a lawyer properly disbarred from the Patent Office because he submitted in support of a patent a ghostwritten article without naming the ghost.

People, ex rel. Chicago Bar Ass'n v. Mall (1933), 354 Ill. 323, 188 N.E. 449, censured a lawyer, who had changed his name from Mall to Haas, because of "his loose and indiscriminate use of the names of Mall *and* Haas after he had caused his name to be legally changed. A strict observance of professional ethics compels us to condemn that use and censure him for not taking more definite means to identify himself before the profession and the public generally under his legally adopted name of Haas." 188 N.E. at 451.

Tennessee Bar Association v. Freemon (1961), 50 Tenn. App. 567, 362 S.W.2d 828, brought disbarment to a lawyer who, retained by the husband to bring a divorce suit, hired an investigator, and with him trailed the wife to a motor court and there, breaking in, took pictures of her without her consent. He "was over zealous and guilty of gross professional impropriety * * *." Said the court, "No lawyer should lower the dignity of his profession by such unseemly conduct." 362 S.W.2d at 833. Similar conduct brought sus-

pension to a lawyer in *State v. Woodville* (1926), 161 La. 125, 108 So. 309. In the court's view, there "ought to be no doubt" that such conduct is "unprofessional" and "calculated to bring the profession into disrepute * * *." 108 So. at 311. The court said it would not "give judicial approval to the conduct of an attorney who takes upon himself the responsibility of making up a case in behalf of his client and procuring the evidence by acting in the capacity of a detective or spy, as was done in this case." 108 So. at 312.

State ex rel. Oklahoma Bar Association v. Ablah (1959, Okla.), 348 P. 2d 172, brought suspension to a lawyer who, over a period of about two months, made 5 to 65 anonymous telephone calls daily to a doctor's office for "the satisfaction of revenge" because, he said, the doctor had said the lawyer "should become a grocer" and the doctor's sister had said he was "odd." 348 P.2d at 175.

In re Howell (1952), 10 N. J. 139, 89 A. 2d 652, brought suspension to a lawyer who, upon reading an editorial hinting the responsibility of the "Good Government Group" for the heart attack of a newly elected councilman, and calling the lawyer the "string-puller from Hopewell," horsewhipped the editor.

In re Blatt (1964), 42 N. J. 522, 201 A. 2d 715, censured a lawyer who brought a divorce suit for the wife and later appeared in the same action for the husband. The court found no Canon violated, but observed: "This Court's disciplinary power is not confined to the area covered by the canons." 201 A. 2d at 716.

In re Aydelotte (1923), 200 N. Y. S. 637, brought suspension to a lawyer because, in the effort to collect his fee bill, he wrote his client that if "forced to take any proceedings," he would "very much dislike" to disclose her "failure to pay income tax for years past * * *." 200 N. Y. S. at 637.

Hartford County Grievance Committee v. Cole (1960), 22 Conn. Sup. 86, 161 A. 2d 590, brought censure to a firm for sending 9,250 Christmas cards, extending the "Season's Greetings" and bearing the firm name, the legend "Attorneys at Law," and the names of the two partners and their six associates. The Court deemed this "conduct clearly unbecoming" to the profession. 161 A.2d at 594.

In re Copland (1940), 66 Ohio App. 304, 33 N.E.2d 857, appeal dismissed (1941), 137 Ohio St. 637, 32 N.E.2d 23, brought disbarment to a lawyer for "unprofessional conduct" because, as a judge, he wrote and published an opinion purporting to describe a case pending before him, which, however, was wholly fictitious. His defense was that the question was an interesting one, and "it was his purpose to edify the Bench and Bar by his thesis published under the guise of an authentic court finding." 33 N.E.2d at 858.

In re Brown (1945), 389 Ill. 516, 59 N.E.2d 855, brought suspension to a lawyer because he had reason to suspect his partner, with the connivance of a client, was submitting bills for legal services never performed, and then refunding the money to the client "to be used by it as a secret slush fund in the bribing of public officials * * *."

59 N.E.2d at 856. The lawyer did not himself participate in his partner's acts and received none of the money. However, "he at least suspected that Dryer's activities in behalf of the power company were not confined to the legitimate practice of the law." 59 N.E.2d at 857. A like case is *In re Alschuler* (1945), 388 Ill. 492, 58 N.E.2d 563. A lawyer, "kicking back" in cash, half of his annual $38,000 retainer to his client for similar purposes, was suspended for three years. "*Any* conduct of an attorney which necessarily tends to bring discredit upon the profession is an abuse of the privilege secured to him by his license." 58 N. E. 2d at 567.

In re Disbarment Proceedings (1936), 321 Pa. 81, 184 Atl. 59, and *In re Davis* (1937), 299 N.Y.S. 632, brought disbarment to lawyers who undertook to serve "Numbers Racket" organizers as lawyers for their underlings when, as was expected, they would from time to time be arrested.

In re Maley (1936), 363 Ill. 149, 1 N.E.2d 495, brought suspension to a lawyer for "conduct that is not creditable to him" for appearing in court drunk.

Fellner v. Bar Association of Baltimore City (1957), 213 Md. 243, 131 A.2d 729, brought disbarment to a lawyer for feeding slugs to parking meters.

In the foregoing examples no Canon expressly warned the lawyer that ghostwriting (a custom, Mr. Justice Jackson, dissenting, 338 U.S. at 324, remarked, "the court below cruelly pointed out flourishes even in official circles in Washington") constituted unprofessional conduct; or that it was wrong to be careless about a name; or that it was improper for the lawyer to go out with his investigator to

take pictures of a divorce suit defendant; or that anonymous telephone calls to cure a slight would bring suspension; or that horsewhipping the editor would bring discipline; or that appearing first for one party and later for the other would be deemed unprofessional; or that hint to a slow-paying client concerning income tax troubles would bring suspension; or that sending Christmas cards would be deemed advertising; or that the writing of an opinion in a case that did not actually exist, would bring disbarment; or that having reason to suspect a partner's shenanigans would bring discipline; or that one does not by prior retainer properly become house counsel for criminals; or that drunkenness may bring not merely a contempt judgment but suspension; or that it is unbecoming of a lawyer to feed slugs into a parking meter.

In light of all these warnings, plain to be read in the books, Ruffalo's argument of vagueness, uncertainty and want of warning, recalls *Northern v. State* (1947), 150 Tex. Crim. Rep. 511, 203 S.W.2d 206, where such argument *did* carry the day. In a decision, probably unmatched anywhere, the court held bad, for vagueness and uncertainty, 203 S.W.2d at 206, an indictment charging that one Buster Northern did, at a time and place named, "with his malice aforethought, kill Fannie McHenry by then and there *kicking" her to death.*

The court held the indictment bad, reversed the conviction, and dismissed the prosecution. The trouble was that the indictment did not say *what he kicked her with.*

Be that as it may, specific warning that it is improper to hire the opposing party's employee to work as an undercover agent to develop evidence against it, was available to Ruffalo. It was to be found in the books, for—

2. Law Long Ago Made Clear It Is Wrong to Hire One to Work Against His Employer.

The employee owes an obligation of loyalty to his employer. *National Labor Relations Board v. Local Union No. 1229, International Brotherhood of Electrical Workers* (1953), 346 U.S. 464. Employees of a radio and television station, engaged in a labor dispute, put out handbills attacking (p. 468) "the quality of the company's television broadcasts." This Court condemned such conduct, and, in an opinion by Mr. Justice Burton, said (p. 472):

> "There is no more elemental cause for discharge of an employee than disloyalty to his employer."

This is well-settled law. The *Restatement, Agency* 2d, Section 394, declares the rule to be:

> "Unless otherwise agreed, an agent is subject to a duty not to act or to agree to act during the period of his agency for persons whose interests conflict with those of the principal in matters in which the agent is employed,"

to which *Comment a* adds (p. 219):

> "This is true although the agent does not agree to give his full time to the principal's business and does not use the time paid for by the principal in acting for another."

Nor will it do to argue, as does Petitioner Ruffalo, that Orlando was only a servant, for the same rules as govern the obligations of agents also "apply to servants." *Restatement, Agency* 2d, Section 429.

Judge Edwards, in the Court of Appeals, in his dissenting opinion, inspected Petitioner Ruffalo's argument that "Orlando's work involved no supervisory responsibilities to his employer and no access to records, confidential or otherwise, which would have assisted him in his daytime job with respondent." 370 F.2d at 462 (A.

83a). The answer Judge Edwards gave to this argument was this:

> "I cannot avoid concluding that Orlando's access to the B. & O.'s property and personnel would be of potential value to respondent and that it would some times be impossible (probably even for Orlando) to know when Orlando was working for the railroad and when he was investigating for respondent." 370 F.2d at 462 (A. 83a).

By any standard, Orlando owed a duty of loyalty to his employer, and, when Petitioner Ruffalo tampered with that relationship, the law told him he committed a wrong. *United States v. Procter & Gamble Co.* (D.C. Mass., 1942), 47 F.Supp. 676. That case involved, to be sure, an asserted theft of the employer's secrets. However, the point there made by Judge Sweeney is equally valid here:

> "When one tampers with that relationship [of employer and employee] for the purpose of causing the employee to breach his duty he in effect is defrauding the employer of a lawful right. The actual deception that is practised is in the continued representation of the employee to the employer that he is honest and loyal to the employer's interests." 47 F.Supp. at 678.

Ruffalo asserts (p. 20), that if there was a wrong, it was Orlando's. The seducer is equally guilty with his victim. This surely is the most ancient of principles. *National Labor Relations Board v. Clearwater Finishing Co.* (4 C.A., 1953), 203 F.2d 938, 939.

Moreover, Ruffalo is mistaken in arguing that (p. 19):

> "The National Railroad Adjustment Board has expressly approved the practice * * *."

The decision Ruffalo cites, *National Railroad Adjustment Board, Award No. 3624*, 21 N.R.A.B. 63, First Divi-

sion (1939), does not justify employment by a lawyer of a railroad worker to investigate cases against his employer. All that the Board approved was the "legal right of *an employe witnessing an accident* to communicate truthfully to the injured fellow employe or his representative, such facts as he may have witnessed * * *." An employee's action in doing so, the Board ruled, "cannot be regarded as disloyalty"—thus recognizing that the employee does owe a duty of loyalty to his employer. Indeed, the spirit of the Adjustment Board's decision Ruffalo relies upon condemns his conduct. In the case before the Board, the employee:

> "took this outsider to the scene of the accident to take photographs, which the outsider used in an effort to solicit employment by decedent's family."

The Board concluded:

> "Such conduct has no shadow of legal right, and the carrier was entirely within its rights in discharging petitioner."

In light of this decision, it is unlikely that the Board would approve the hiring by a lawyer of a railroad employee, as an undercover agent, to develop evidence for use in suits against his employer.

To the same effect are:

Atchison, T. & S. F. Ry. Co. v. Andrews (1949), 338 Ill. App. 552, 88 N.E.2d 364, 371;

Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees v. Atlantic Coast Line Railroad Company (E.D. N.C., 1957), 154 F.Supp. 71, 75, affirmed (4 C.A., 1958), 253 F.2d 753, 758;

National Labor Relations Board v. Clearwater Finishing Co. (4 C.A., 1953), 203 F.2d 938, 939.

The arrangement Ruffalo defends, the court, in *Atchison*, 338 Ill. App. 552, 88 N.E.2d 364, branded "a new low." There, the Atchison, Topeka & Santa Fe, and the Southern Pacific brought suit to enjoin a Chicago lawyer from prosecuting 40 actions against the Santa Fe, and 34 actions against the Southern Pacific, filed in Chicago by persons residing in California, Arizona and New Mexico. The court enjoined the lawyer from prosecuting those actions, largely on the ground they were obtained by "chasers" working for the lawyer. Observe, however, that the arrangement, as here, involved employment by a lawyer of a railroad employee to investigate a case against his employer. The person hired by the lawyer:

> "was at that time Yardmaster for the Santa Fe Railroad Company and Andrews [the lawyer] employed him to investigate a personal injury case [against Santa Fe]." 88 N.E.2d at 367.

The court regarded it:

> "a new low level when members of the instant conspiracy induced, by promises of reward, certain Santa Fe employees to secretly enter into the conspiracy against their employer." 88 N.E.2d at 371.

The enlistment of "employees of plaintiffs [the railroads] to serve him [the lawyer] to the injury of their employers" the court called "unconscionable." 88 N.E.2d at 371.

Brotherhood, 154 F.Supp. 71, expresses the same view. The National Railroad Adjustment Board ordered the railroad to reinstate an employee with back pay. The railroad refused. The court upheld the railroad. The employee, an office clerk, was fired because, after hours, he entered a company building (p. 73) with a "professional photographer, and another gentleman" to take photographs of

a spiral stairway located in the building. It appeared that (p. 73):

> "An employee of the Company was involved in a damage suit with the Company, and the pictures taken of the circular staircase might be used as evidence in the case."

The union objected that the employee could not be disciplined for this because *nothing in the labor agreement prohibited* conduct of this kind, *or warned him* that he would be disciplined for it.

The court refused to enforce the Board's order of reinstatement because the conduct of the employee (p. 75):

> "was overt action directed against the known interests of the Company * * *."

Judge Gilliam put it this way (p. 75):

> "What could he have done that would have been more detrimental to his employer than assisting the employer's adversary in litigation that was in progress by obtaining evidence in a clandestine manner in his capacity as an employee?"

The court added (p. 75):

> "Phillips [the employee] was in no way engaged in any protected union activity, but was helping a plaintiff press a personal injury claim."

The Court of Appeals, 253 F.2d 753, affirmed. The court, Judges Parker, Sobeloff and Haynsworth, concluded that the district judge had correctly held that the employee's (p. 758):

> "discharge was not arbitrary or unreasonable on the part of the railroad in view of the attitude of disloyalty which he had manifested * * *."

National Labor Relations Board v. Clearwater Finishing Co. (4 C.A., 1953), 203 F.2d 938, illustrates the same rule. It appeared that (p. 939):

> "Hutto, an employee in respondent's shop, prevailed upon Livingston, an employee in its office, to furnish him information from the files in the office which he desired to use against respondent in the hearing of the [unfair labor practice] charge which was then pending against it."

The employer fired both Hutto and Livingston.

The National Labor Relations Board held Livingston was properly discharged, but not Hutto, and the employer was ordered to take him back. The Court of Appeals refused to enforce the order. The court agreed there was good ground for discharging Livingston, for he was the one who stole the information. But, said the court, Judges Parker, Soper and Dobie (p. 939):

> "We think that the same was true of the conduct of Hutto who *induced* Livingston to furnish it."

The Court went on to say, as to Hutto's conduct (p. 939):

> "The fact that he intended to use the information in a labor hearing did not justify what he did nor preclude respondent from discharging him for conduct which any employer would have resented whether connected with union activity or not."

One more example: A lawyer's obligation cannot be less than is demanded of a co-adventurer in a real estate transaction, illustrated by *Meinhard v. Salmon* (1928), 249 N.Y. 458, 164 N.E. 545. Salmon, a real estate operator, lessee of New York property for 20 years, entered into an agreement with Meinhard, a wool merchant, whereby Meinhard was to advance half the necessary funds for improvements in return for 40% of the profits for five years and 50% thereafter, Salmon to manage the property. Near the end of the 20-year term Elbridge T. Gerry, owner of the reversion and of adjacent property, approached the lessee Salmon and agreed to lease the origi-

nal property plus others to Salmon for 20 years renewable to 80, Salmon to remove the existing structures on the land and erect a new building on the whole. Salmon did not tell Meinhard about the new proposal. Meinhard learned about it afterwards. The Court held that in the original lease, Salmon and Meinhard "were co-adventurers" and Salmon "was manager as well." 164 N.E. at 546. The Court held Salmon could not seize the new opportunity for himself and must admit Meinhard to a share. All that was involved was a commercial transaction, but the co-adventurer, Judge Cardozo observed (as the lawyer here):

> "might fairly expect to be reproached with conduct that was underhand, or lacking, to say the least, in reasonable candor * * *." 164 N.E. at 548.

See also the section in *Legal Ethics*, Drinker, (1953), p. 155, on "Employment of underhanded means to get evidence * * *."

Only by ignoring all that the courts have written about professional standards, and the examples in the decided cases, can Petitioner Ruffalo say he did not know, and was given no warning of, the conduct required of a lawyer.

The cases Petitioner Ruffalo relies upon to attack his disbarment show his reliance is misplaced. The decisions cited are inapplicable. This will become apparent upon noting that Ruffalo relies upon:

> *Connally v. General Construction Company* (1926), 269 U.S. 385, which held an Oklahoma statute requiring payment of the (p. 393) "current rate of wages" void for uncertainty because it required payment (p. 394) "from so much (the minimum) to so much (the maximum), including all between * * * without saying which * * *."

Lanzetta v. New Jersey (1939), 306 U.S. 451, which held void for vagueness a New Jersey statute subjecting to punishment one (p. 452) "known to to be a member of any gang * * *."

Champlin Refining Co. v. Corporation Commisson of Oklahoma (1932), 286 U.S. 210, which held "waste of petroleum," prohibited by an Oklahoma statute, too vague to be upheld because that standard (p. 242) was "not known to the common law or shown to have any meaning in the oil industry * * *."

Giaccio v. Pennsylvania (1966), 382 U.S. 399, holding invalid a Pennsylvania statute which allowed a jury upon acquitting a defendant to impose, without any standard at all, costs enforceable by commitment to jail.

Nor is there nourishment for Ruffalo in the so-called "group legal service cases," *Brotherhood of Railroad Trainmen v. Virginia ex rel. Virginia State Bar* (1964), 377 U.S. 1, and *National Association For the Advancement of Colored People v. Button* (1963), 371 U.S. 415, to which this Court the other day added *United Mine Workers of America, District 12 v. Illinois State Bar Association, No. 33,* (October Term, 1967), decided December 5, 1967. These decisions seek to bring legal services to those who otherwise might not have them but they surely are not to be read to mean that a lawyer in supplying such services is free to pursue methods that are underhanded and disreputable.

Nor will Ruffalo's argument (p. 21) that he merely "represented his client well" justify such methods. Canon 15 denounces the view that a lawyer may do "whatever may enable him to succeed in winning his client's cause." On this point, *In re Greathouse* (1933), 189 Minn. 51, 248

N.W. 735, although dealing with the solicitation of lawsuits, expresses views pertinent here. The court said:

> "The argument of respondent's counsel is that * * * if a lawyer is honest with his clients his conduct is necessarily ethical. With this we do not agree * * *. If he does not appreciate the sense of duty for his own sake, we must impress it upon him for the sake of others in the profession, and also for the public welfare * * *." 248 N.W. at 739.

The court added:

> "What we are concerned with is that an attorney does not indulge in such conduct as will bring upon himself, the bar, or the courts the public odium. * * * We expect any person found morally fit to be admitted to practice law to have and to exercise a keen sense of propriety * * *." 248 N.W. at 741.

The statute, 45 U.S.C. 60, Ruffalo relies upon, will be much distorted if it is read to authorize the kind of thing Ruffalo embarked upon. Ruffalo had the right to interview witnesses, and Orlando had the right to tell whatever he might know, the statute says, "as to the facts incident to the injury or death of any employee," but neither had the right to do so in disguise, or to pretend he was what he was not.

In summary—*on this point*—the history of seven centuries of discipline since the birth of the profession, the Rule itself of this Court that disbarment will follow conduct "unbecoming a member of the bar," the oath the lawyer takes, the Canons, the decisions of courts, brand it a wrong to hire a workman as an undercover agent to develop evidence and information for use in suits against his employer. When perception is blunted, and the ear dulled, to those teachings, courts rightly conclude, as did the Sixth Circuit and the Supreme Court of Ohio that "one who believes that it is proper to employ and pay

another to work against the interests of his regular employer is not qualified to be a member" of the bar. On the other hand, "He is even less qualified if he does so, when he knows, as the evidence clearly indicates Ruffalo did know, that it is improper to do so." 176 Ohio St. at 269 (A. 8a).

Next, note that—

III. CONSTITUTIONAL CLAIMS WITH RESPECT TO RECORDS ASSERTED BY PETITIONER RUFFALO ARE INAPPLICABLE.

No constitutional right of Petitioner Ruffalo was violated.

Ruffalo incorrectly argues that he was disciplined for failure "to make book entries," and produce them, and that this violated Fifth and Fourteenth Amendment rights.

Ruffalo was *not* disbarred for failure to make, keep, or produce records.

The Sixth Circuit disbarred Ruffalo on the ground that he demonstrated his want of that "fair character and integrity which must be a mark of a lawyer," 370 F.2d at 453 (A. 64a), when he hired a railroad employee to act as an undercover agent to obtain evidence and information for use in suits against his employer. The facts concerning that employment were freely admitted by Ruffalo and are unquestioned by him here.

The testimony before the Ohio Supreme Court Board of Commissioners on Grievances and Discipline about records entered into the case before the Supreme Court of Ohio in two respects:

1. **It confirmed Ruffalo's awareness** of the impropriety of his conduct. Ruffalo regularly kept records and paid all other investigators by check (A. 95a), but he

said (Petitioner's brief p. 28), he did not do so here because "he knew the railroad would be angered" and "we kept it that way" because "we didn't want to get him involved with the B. & O. Railroad" (A. 93a), and "we got rid of" the records "as soon as they were examined by the Internal Revenue Department" (A. 93a) because "we didn't want it to be known, in case any question came out about it, that he was a B. & O. employee" (A. 95a); "we didn't want * * * the company finding out about it * * *." (A. 101a, 120a, 123a, 124a, 127a.)

Under such circumstances a lawyer can expect a court to ask, as did the Supreme Court of Ohio, "If the respondent *did not know* that it was wrong to do this, why did he try to cover it up?" 176 Ohio St. at 268 (A. 7a), and to conclude, as did the Supreme Court of Ohio: "Ruffalo *did know,* that it is improper to do so." 176 Ohio St. at 269 (A. 8a).

But whether Petitioner Ruffalo knew or not is immaterial. "In our opinion, *one who believes that it is proper* to employ and pay another to work against the interests of his regular employer is not qualified to be a member of the Ohio Bar." 176 Ohio St. at 269 (A. 8a).

The facts, freely admitted, are not questioned and manifestly demand the discipline imposed.

The second point about the testimony concerning records is that:

2. **It bore on Ruffalo's frankness and honesty.** Ruffalo argues that he could not have been compelled to testify. The point is that he *did* testify. And, what he said about the records bore on his credibility. Whether Ruffalo wanted to produce the records or not, the court could properly consider *what he said about the records* in deciding to what extent he was worthy of belief. For example, at hearings in December 1962 Ruffalo testified

he had no records concerning his payments to Orlando, or showing what Orlando did until his work as an undercover investigator stopped on the very day he was suspended by the B. & O. on July 18, 1961. (A. 138a.) And, apart from his reports to the Treasury on Form 1099, he produced none. Ruffalo said he had no records *because* "as soon as they were examined by the Internal Revenue Department, why, we got rid of them * * *." (A. 93a.)

In weighing this explanation, the court was entitled to consider that Ruffalo, by law, was obligated:

1. *To file his report to the Treasury,* on Form 1099, relating to payments made to Orlando in 1961, on or before February 28, 1962. See Reg. § 1.6041-1(a)(2) and (3), and § 1.6041-6, adopted February 13, 1959, by T. D. 6364; 625 CCH § 5077.

2. *To preserve his records* "for at least four years after the due date of such tax for the return period to which the records relate, or the date such tax is paid, whichever is later," by Reg. § 31.6001-1(e)(2) promulgated by the Secretary of the Treasury pursuant to § 6001 of the Internal Revenue Code of 1954, and that, accordingly, in this case, as to 1961 payments to Orlando, Ruffalo was required to preserve his records until 1966. He should have had, when he testified in 1962, records going back to 1958. But he said he had none.

The court thus was entitled to consider whether it was probable that Ruffalo in 1962 told the truth when he said he no longer had records concerning 1961 which the law required him to maintain at least until 1966, and was justified also in observing, "*It is difficult to believe* that the 1961 federal income tax returns of either Orlando or

Ruffalo had been checked by the Internal Revenue Service before July or even September 1962." 176 Ohio St. at 269 (A. 8a).

Thus, with respect to records, Ruffalo's appeal to *Spevack v. Klein* (1967), 385 U.S. 511, *Griffin v. California* (1965), 380 U.S. 609, and *Malloy v. Hogan* (1964), 378 U.S. 1, is misplaced. Those cases deal with matters that do not arise in this case.

Finally—

IV. ISSUE OF MAINTAINING CLIENTS IS NOT PROPERLY HERE.

The Sixth Circuit did not disbar Petitioner Ruffalo for maintaining clients.

At the same time, it is inaccurate to say (Petitioner's brief, p. 8) that the Court of Appeals concluded "that one of the two charges [i.e., Charge 8, of maintaining clients] did not justify discipline," and inaccurate to say (p. 13) that "the Court of Appeals said it would not disbar on Charge 8 'standing alone' * * *." To the contrary, the Court of Appeals said (as Petitioner concedes on page 13):

> "We do not reach that question." 370 F.2d at 450 (A. 58a).

The Court of Appeals, moreover, made clear that it was not ruling on any of the other charges made by the Board of Commissioners on Grievances and Discipline, *i.e.* Charges 3, 8, 9, 10, 11, 12. The court said:

> "Our failure to discuss them should *not* be construed as indicating that we disagree with or find unreliable the other findings of the Board of Commissioners." 370 F.2d at 449, Note 2 (A. 56a).

If, therefore, there is occasion to pass on charges other than the charge concerning the undercover agent, those

charges should be remanded to the Court of Appeals. The Court of Appeals might have a different view of those charges than Petitioner Ruffalo attributes to it. This is so for two reasons:

1. Ohio law condemns the practice of maintaining clients by advancing funds, other than the lawsuit expenses allowed by Canon 42, and then only if made "in good faith" and "subject to reimbursement," as the Ohio Supreme Court's judgment in Ruffalo's case shows. It is inaccurate for Ruffalo to assert (Petitioner's Brief, p. 42) that the Ohio Supreme Court judgment against him on this ground conflicts with its earlier decisions "approving loans to poor clients * * *." In the petition for certiorari in the case at bar, Petitioner Ruffalo (p. 21) cited four Ohio cases in support of his argument that the earlier Ohio cases approved loans to clients; now Petitioner cites (p. 42) only one of the four, *Reece v. Kyle* (1892), 49 Ohio St. 475, 31 N.E. 747. None of the four cases justifies Ruffalo's claim. Observe that:

Reece v. Kyle (1892), 49 Ohio St. 475, 31 N.E. 747, treated by Ruffalo as (p. 42) "approving loans to poor clients," falls considerably short of doing so. In that case creditors of one McMillan sought to set aside an assignment McMillan had made to lawyer Reece of a judgment the lawyer had obtained for McMillan, but which remained unpaid. McMillan had thereupon (p. 476) assigned that judgment to lawyer Reece in consideration of the legal services the lawyer had performed in getting that judgment, and that he would perform in trying to collect it, Reece to keep one-half of the proceeds and pay the other half to McMillan. The contract of assignment provided (p. 476) "Reece to advance the amount *necessary*

for expenses of the case; and one-half of said expenses is to be repaid to said Reece in the event nothing is realized from said judgment." McMillan's creditors attacked the assignment on the ground (p. 475) it "was without any consideration * * *." The court upheld the assignment. The court saw nothing wrong in undertaking (p. 488) "to enforce a claim solemnly adjudicated by a court to be just and legal, by one who has an interest in the judgment because of services rendered in obtaining it." The case holds merely that a contingent fee contract is valid and that advancement of funds (p. 486) "in payment of *costs and necessary incidental expenses*" may be made, as Canon 42 allows; it is quite wrong to say the case supports advancement of living expenses to clients.

Scheinesohn v. Lemonek (1911), 84 Ohio St. 424, 95 N.E. 913, holds only that if a lawyer accepts an account for collection for 25% of the recovery, and the client, without cause, takes the matter out of the lawyer's hands before he has done any work, he is entitled to recover "the rate of compensation fixed by the contract."

Roberts v. Montgomery (1926), 115 Ohio St. 502, 154 N.E. 740, holds merely that a one-third contingent fee contract is valid, and, if the injured party himself effects a settlement "the percentage of the settlement money designated as compensation in the contract belongs to the lawyers."

Cleveland Railway Co. v. Godfrey (1928), 28 Ohio L. Rep. 466, holds only that if a defendant settles behind the lawyer's back, it must pay to the lawyer the 50% fee of his contingent contract.

These cases establish that a contingent fee contract is valid, but it is wrong to say they justify a lawyer in advancing living expenses to clients while their suits are pending.

2. The Court of Appeals probably would condemn the practice of maintaining clients. This appears from *Dombey, Tyler, Richards & Grieser v. Detroit, Toledo & Ironton Railroad Company* (6 C.A., 1965), 351 F.2d 121, where the court, in a suit by lawyers to recover fees, remanded the case to the District Court to determine whether the attorneys' agreement to advance funds to the client was champertous. The court, Judges O'Sullivan, Cecil and Smith, observed (p. 128):

> "The District Judge made no finding as to whether there was an agreement to advance money to Craig *for living expenses* pending disposition of his claim. Neither did the District Court discuss whether such an agreement would render the representation contract champertous."

The court remanded (p. 128) "for findings upon the facts relevant to this question of maintenance." Judge Talbot Smith, in his concurring opinion, agreed (p. 138) "the matter should be explored, as a matter of public policy, because of its gravity."

Observe the court's citation, 351 F.2d at 129, of *El Janny v. Cleveland Tankers, Inc.* (N.D. Ind., 1962), 209 F.Supp. 91. In *Janny* two sets of lawyers claimed fees. The plaintiff had employed lawyers under a contingent fee contract and then fired them (p. 92) "because they wouldn't loan me money," and put his case in the hands of another lawyer who agreed (p. 92) "to take the case on a 33⅓% basis and to 'take care of * * *'" the original set of lawyers. The court observed (p. 93):

"It would also appear that he got the case because he was willing to loan the plaintiff money."

The new lawyer (p. 92):

"almost immediately started advancing plaintiff money in sizable amounts. The total advances amounted to approximately $5,000.00. It was asserted that this money was needed *for living and medical expenses* and about $1,200.00 was used to finance a trip to Lebanon by plaintiff's wife and children."

A settlement of the client's lawsuit finally was reached, and the question before the court was the division of the money. The court, Judge Beamer, remarked (p. 93):

"The propriety of the practice of loaning or advancing money to clients in personal injury cases has long been questioned by the Courts and the organized bar. Several Courts have adopted rules prohibiting the practice. The Committee on Professional Ethics of the American Bar Association in 1954 issued an opinion in which it held that this practice 'would constitute a clear violation of the Canons of Professional Ethics.' "

The court refused to make a division of the fund so as to reimburse the second lawyer for his advancements, saying (p. 94):

"This Court will not lend its office to, or in any way, encourage or sanction the practice of attorneys advancing or loaning funds to clients *for living expenses* or purposes other than costs connected with the actual prosecution of a case during the pendency of personal injury litigation."

If, therefore, other charges against Petitioner Ruffalo need to be examined, it is suggested that it will be appropriate to have them first ventilated in the Court of Appeals.

CONCLUSION.

The judgment of the Court of Appeals for the Sixth Circuit should be affirmed.

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